INDEX

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

DONALD C. CASS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Donald C. Cass, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on August 1, 1973, which reversed a judgment of the United States District Court of the District of Montana. The District Court held that the petitioner was eligible for readjustment pay under 10 USC § 687(a).

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana dated June 20, 1972 has been published at 344 F.Supp. 550, and is printed herein as Appendix A. The opinion of the Court of Appeals for the Ninth Circuit dated August 1, 1973 has not yet been published and is printed herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is an individual involuntarily released from active duty with the Armed Forces entitled to readjustment pay in accordance with 10 USC § 687(a) where such individual has served more than four years and six months, but less than five years, of continuous active duty?

STATUTORY PROVISION INVOLVED

10 U.S.C. § 687 (a) provides in pertinent part:

> "Non-Regulars: readjustment payment upon involuntary release from active duty
>
> (a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Con-

gress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included."

STATEMENT OF FACTS

As a member of the United States Army Reserve, the petitioner served a tour of active duty with the United States Army from July 16, 1966 to April 26, 1971 at which time the petitioner was honorably and involuntarily released from active duty, having completed four (4) years, nine (9) months and thirteen (13) days of continuous active duty. At the time of his involuntary release from active duty petitioner had attained the rank of Captain and was receiving a base pay of $1,063.80 per month.

On April 20, 1971, petitioner requested from the Department of the Army a lump-sum readjustment payment in the sum of $10,638.00 which was the amount of readjustment payment due calculated in accordance with the provisions of 10 U.S.C. § 687 (a) under the assumption that petitioner was eligible for a readjustment payment. Petitioner's request was denied.

Petitioner brought suit against the United States in the United States District Court for the District of

Montana and for jurisdictional purposes waived all readjustment pay due in excess of $10,000. The parties stipulated to the above recited facts and agreed that on the basis of these facts the District Court should determine whether petitioner was entitled to the readjustment payment prayed for in accordance with 10 U.S.C. § 687(a).

The District Court relied upon the decision of the Court of Claims in *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cl.), (1971), *cert. denied,* 404 U.S. 951, in concluding that the rounding provision, 10 U.S.C. § 687(a)(2), applies to both eligibility for and the computation of a readjustment payment. The District Court therefore entered judgment for petitioner in the sum of $10,000. The *Schmid* decision is printed herein as Appendix C.

The Government appealed the District Court's decision to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed, rejecting the interpretation of 10 U.S.C. § 687(a)(2) rendered by the Court of Claims in *Schmid* and relied upon by the District Court. The Court of Appeals concluded that the rounding provision of 10 U.S.C. § 687(a) applies only to the determination of the amount of readjustment payment, and not to the eligibility requirement for readjustment pay.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals for the Ninth Circuit Directly Conflicts with a Recent Decision of the Court of Claims

The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the case of *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cl.), *cert. de-*

nied, 404 U.S. 951 (1971). The Court of Claims held in *Schmid* that 10 U.S.C. § 687(a) requires only four years and six months of continuous active duty in order for an individual involuntarily released from active duty to be eligible for a readjustment payment. The Court of Claims concluded:

> We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that "For the purposes of this subsection * * * (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *. Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year. 436 F.2d at 989.

Additionally, after a review of the legislative history of § 687(a), as urged by the Government, the Court of Claims nevertheless concluded that the intent of Congress was in accord with the plain meaning of 10 U.S.C. § 687(a).

In reversing the decision of the District Court for the District of Montana, the Court of Appeals for the Ninth Circuit expressly rejected the rationale of the Court of Claims in *Schmid* and held that 10 U.S.C. § 687(a) was clear on its face in requiring five years of continuous active duty in order to confer eligibility for a readjustment payment. The Ninth Circuit also held that the legislative history behind 10 U.S.C. § 687(a) supports this interpretation. The petitioner submits that the Ninth Circuit erred in not following the rationale set forth in *Schmid*.

The Supreme Court has in the past acted to resolve a conflict between a decision of a circuit court and a decision of the United States Court of Claims. See *Waterman S.S. Corp.* v *United States,* 381 U.S. 252 (1965); *United States* v. *Zacks,* 375 U.S. 59 (1963); *United States* v. *Gilmore,* 372 U.S. 39 (1963); *American Auto. Ass'n.* v. *United States,* 367 U.S. 687 (1961); *United States v. Consol. Edison Co.,* 366 U.S. 380 (1961). A resolution of the issue involved in this case by this Court is particularly desirable since there are other cases pending involving this identical issue in the Court of Claims, the Court of Appeals for the Seventh Circuit and at least two district courts. A summary of the pending cases is printed at Appendix D. There are hundreds, if not thousands, of individuals who have been and may be involuntarily released from active duty with at least four years and six months, but less than five years, of continuous active duty, and therefore the issue involved in this case is of great importance to past and present members of the Armed Forces and to the Government.

CONCLUSION

The requested Writ of Certiorari should be granted in order to resolve the conflict between the decision of the Court of Claims in *Schmid* v. *United States* and the decision of the Ninth Circuit Court of Appeals in *Cass* v. *United States.*

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Opinion of the United States District Court for the District of Montana

Dated June 20, 1972

DONALD C. CASS, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

Civ. No. 2014.

UNITED STATES DISTRICT COURT,
D. MONTANA,
HELENA DIVISION.

JUNE 20, 1972.

Proceeding on claim of involuntarily released officer for readjustment pay. The District Court, Russell E. Smith, C.J., held that rounding provision in statute providing for readjustment pay upon involuntary release from active duty applies to both eligibility for and computation of readjustment pay; thus, officer who was involuntarily released from active duty after serving four years, nine months, and thirteen days of continuous active duty was entitled to readjustment pay.

Judgment for plaintiff.

Armed Services § 13.1(16)

Rounding provision in statute providing for readjustment pay upon involuntary release from active duty applies to both eligibility for and computation of readjustment pay; thus, officer who was involuntarily released from active duty after serving four years, nine months, and thirteen days of continuous active duty was entitled to readjustment pay. 10 U.S.C.A. § 687(a) (2).

Charles A. Smith, Smith & Harper, Helena Mont., for plaintiff.

Otis L. Packwood, U. S. Atty., Billings, Mont., for defendant.

OPINION AND ORDER

RUSSELL E. SMITH, Chief Judge.

This case was submitted on an agreed statement of facts which is adopted as the findings of the court.

Plaintiff, Donald C. Cass, was a member of the United States Army Reserve and served a tour of active duty with the Army from July 16, 1966, to April 26, 1971—four years, nine months, and 13 days of continuous active duty. Cass was honorably and involuntarily released from active duty on April 26, 1971, and as Captain was then receiving base pay of $1,063.80 per month. Upon notification that he was released, Cass requested a lump-sum readjustment payment as provided by 10 U.S.C. § 687(a). The request was refused because Cass had not served a full five years.

Cass seeks the amount of readjustment pay due, $10,638.00, but for jurisdictional purposes has waived all in excess of $10,000.00.

The statute in question reads as follows:

> § 687(a) . . . a member of the Army or the Air Force without component who is released from active duty involuntarily, . . . and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * *For the purposes of this subsection—*

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) *a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;* and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included. (Emphasis added.)

On the authority of Schmid v. United States, 436 F.2d 987, 193 Ct.Cl. 78 (1971), cert. denied, 404 U.S. 951, 92 Sup. Ct. 283, 30 L.Ed. 2d 268 (1971), I conclude that the rounding provision, 10 U.S.C. § 687(a)(2), applies to both eligibility for and the computation of the readjustment pay.

It is ordered that plaintiff have judgment against the defendant in the sum of ten thousand dollars ($10,000.00).

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit

Dated August 1, 1973

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2633

DONALD C. CASS, *Appellee,*

v.

UNITED STATES OF AMERICA, *Appellant.*

Nos. 72-3028, 72-3029, 72-3030

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST, *Appellees,*

v.

SECRETARY OF THE NAVY, ET AL., *Appellants.*

[August 1, 1973]

72-2633—Appeal from the United States District Court, District of Montana, Helena Division

72-3028) Appeal from the United States District Court,
72-3029) Central District of California
72-3030)

Before: MERRILL and CHOY, Circuit Judges, and CONTI,* District Judge

CONTI, D.J.:

This case involves the interpretation of 10 U.S.C. 687(a), which permits servicemen to receive readjustment payments upon release from the armed forces. Two issues are

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* Honorable Samuel Conti, United States District Judge, Northern District of California, sitting by designation.

involved in this appeal: (1) Whether the "rounding provision" of subparagraph (2) of 10 U.S.C. 687(a) applies to reduce the eligibility requirement for readjustment pay; and (2) whether the preliminary injunction issued by the District Court in the Adams-Steneman-Youngquist cases would moot this appeal because they would now qualify under any interpretation of the statute.

These actions were instituted by reserve officers on active duty in the Armed Forces. Each had served more than four and a half years and less than five years. Cass was honorably and involuntarily discharged from the Army. Adams, Steneman and Youngquist, captains in the Marine Corps, were ordered to be involuntarily released from active duty under honorable circumstances, but obtained a preliminary injunction which prevented their release until after they had served more than five years. The preliminary injunction was then dissolved while their cases were still pending. In all the cases the trial courts found in favor of the plaintiffs.

With regard to the substantive issue of whether or not 10 U.S.C. 687(a)(2) was properly interpreted by the district court, it is the opinion of this court that it was not.

The relevant statute provides in pertinent part:

> ". . . a member of a reserve component . . . who is released from active duty involuntarily . . . who has completed, immediately before release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."

The district courts ruled in favor of plaintiffs, following the rationale of *Schmid* v. *United States,* 436 F.2d 987 (Ct.Cls.) cert. denied 404 U.S. 951 (1971). In *Schmid* the court of claims decided that the rounding provision of 687(a)(2) that "a part of a year that is six months or more is counted as a whole year" applied not only for the purposes of calculating the amount of the readjustment pay owed servicemen eligible for payments, but also in determining whether the five year eligibility requirement was met. Thus, if appellees' position is correct, their time in service (more than four and a half years) was properly rounded off to five years in the district courts and they were thus eligible and entitled to readjustment payments under 10 U.S.C. 687(a). We disagree and reverse.

The concept of readjustment pay was originally made into law in 1956. That Act of July 9, 1956, 70 Stat. 517, 50 U.S.C. 1016(a) (1958 ed.) provided in pertinent part:

"A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for a break in service of not more than thirty days . . . is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purpose of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year* . . ." (Emphasis added)

Thus, that Act clearly provided that the rounding provision applied only to the determination of the amount of payment, and not to the eligibility requirement. In 1962, the statute was codified into its present form.

The present form of the statute does not explicitly limit the rounding provisions to computation of the amount of the benefits. However, the clause of the statute which sets the minimum eligibility at five years, appears to be clear on its face and not subject to the interpretation given it by the court in *Schmid*.

However, even if the statute is arguably ambiguous, the result is unchanged. The rounding provisions conflict with the clear statement that five years is required for eligibility, if the rounding provision applies to eligibilty. The use of the rounding provision would serve no useful purpose in determining eligibility. Eligibility is defined in terms of a fixed duration under the statute. The rounding provision could only be applicable in a situation in which a serviceman had served between four and a half and five years. There is no apparent reason why Congress would choose such a circuitous method to determine eligibility.

An examination of the legislative history behind the 1956 and 1962 versions of the statute supports the interpretation argued by appellant. The senate hearings on the 1956 bill specifically considered and adopted the language which limited the rounding provision to the computation of the amount of the payment. 1956-2 U.S. Code Cong. & Ad. News, pp. 3068, 3070.

In 1962, Congress codified the readjustment payment laws. In the process the language that the rounding provision was limited to the computation of the amount of readjustment pay was deleted. However, the senate report on the new law stated that the bill "is not intended to make any substantive change in the existing law". Senate Report No. 1876, 87th Cong. 2d Sess., 1962 U.S. Code & Ad.

News, p. 2456. It would be inconsistent with the above declaration for this court to construe that Congress intended to broaden the eligibility requirements. Therefore, we reverse on the substantive issue of interpretation of 10 U.S.C. 687(a).

With regard to the arguments of Adams, Steneman and Youngquist that the preliminary injunction issued by the district court in their cases served to make them eligible for readjustment benefits under any interpretation of the statute, we disagree.

The case of *Paul* v. *Seamens*, 468 F.2d 361 (1st Cir. 1972), held that a preliminary injunction designed to preserve the status quo, cannot count toward retirement benefits. In the case at bar, we have decided for appellant, and therefore the injunction in the district court was improperly issued, and cannot be relied upon to support eligibility for readjustment benefits.

The injunction created no additional rights in appellees that they did not have under the statute in question. Any other decision would allow appellants to "bootstrap" themselves into eligibility.

Therefore, the decisions of the district court are reversed.

APPENDIX C

Opinion of the United States Court of Claims

ARTHUR C. SCHMID, JR.

v.

THE UNITED STATES.

No. 493–69

UNITED STATES COURT OF CLAIMS.

JAN. 22, 1971.

[436 F.2d 987]

Proceeding on claim by involuntarily released officer for readjustment pay. On plaintiff's motion and defendant's cross motion for summary judgment, the Court of Claims, Collins, J., held that rounding provision in statute providing for readjustment payment upon involuntary release from active duty applies equally to eligibility requirement and to method of computation, so that officer who was involuntarily released from active duty after having served 4 years, 6 months and 27 days of continuous active duty was entitled to readjustment pay.

Judgment for plaintiff.

Nichols, J., dissented and filed opinion.

Armed Services—13.1(16)

Rounding provision in statute providing for readjustment payment upon involuntary release from active duty applies equally to eligibility requirement and to method of computation, so that officer who was involuntarily released from active duty after having served 4 years, 6 months and 27 days of continuous active duty was entitled to readjustment pay. 10 U.S.C.A. § 687(a)(2).

Arthur B. Hanson, Washington, D. C., attorney of record, for plaintiff.

Arthur A. Birney, Washington, D. C., and John H. Blish, Providence, R. I., of counsel.

Arthur E. Fay, Washington, D. C., with whom was Asst. Atty. Gen. William D. Ruckelshaus, for defendant.

Before Cowen, Chief Judge, and Laramore, Durfee, Davis, Collins, Skelton, and Nichols, Judges.

On Plaintiff's Motion and Defendant's Cross-Motion For Summary Judgment

Collins, Judge.

This case comes to us on the parties' cross-motions for summary judgment. There is no dispute as to the facts.

On June 27, 1969, Arthur C. Schmid, Jr., plaintiff herein, was involuntarily released from active duty as a member of the United States Naval Reserve. On the date of his release plaintiff had attained the rank of lieutenant and was receiving a base pay of $753 per month. He had served 4 years, 6 months, and 27 days of continuous active duty, beginning November 30, 1964. Previously, he had served on active duty from June 30, 1958, to August 30, 1962, a period of 4 years, 1 month, and 30 days. The present claim arises out of the denial by the Department of the Navy of plaintiff's request for readjustment pay pursuant to 10 U.S.C. §687(a), as amended (Supp. III, 1965-67), and it is this statute to which we must now direct our attention.

The statute provides, in relevant part, as follows:

§ 687. Non-Regulars: readjustment payment upon involuntary release from active duty.

(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty

for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) *a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;* and

(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included. [Emphasis supplied.]

It is the Government's position that the statute is ambiguous, but that its legislative history makes it clear that the rounding provision of subsection (2) was intended to apply only to the computation of readjustment pay and not to the 5-year eligibility requirement therefor. That is, the Government argues that the statute, illuminated by its legislative history, requires continuous active duty service of 5 actual years in order to establish eligibility for readjustment pay. Thus, since plaintiff was on continuous active duty for less than 5 actual years during his last period of active duty, he has not established eligibility under the statute and is not entitled to readjustment pay.

Plaintiff argues that the statute is clear on its face—the rounding provision applies equally to the eligibility

requirement and to the method of computation. There is, therefore, no need to refer to legislative history, which, according to plaintiff, is supportive of plaintiff's position or, at least, ambiguous. Because plaintiff served more than 4 years and 6 months of continuous active duty immediately before his discharge, he claims that, for purposes of the eligibility requirement, he has served the required 5 years.

We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that "For the purposes of this subsection * * * (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *." Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year.

But, although we find no ambiguity in the words of the statute, we are not precluded from examining the legislative history underlying the enactment in order to determine whether there is clear and compelling support for the interpretation urged by the defendant. *See* Lionberger v. United States, 371 F.2d 831, 834, 178 Ct.Cl. 151, 157, cert. denied, 389 U.S. 844, 88 S.Ct. 91, 19 L.Ed. 2d 110 (1967). As the Supreme Court has said, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940) (footnotes omitted). After a careful review of the legislative history of section 687(a), we conclude that the support which it lends to defendant's po-

sition is not so clear and compelling as to require us to adopt an interpretation of the section inconsistent with the clear import of its terms.

Section 687(a) was first enacted in 1962[1] and was intended as a revision of the former readjustment pay statute, Act of July 9, 1956, ch. 534, § 265, 70 Stat. 517. The 1956 statute, which was repealed by section 687(a), read, in pertinent part, as follows:

> "SEC. 265. (a) A member of a reserve component who is involuntarily released from active duty after the enactment of this section and after having completed immediately prior to such release at least five years of continuous active duty, except for breaks in service of not more than thirty days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. *For the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded*, and (2) any prior period for which severance pay has been received under any other provision of law shall be excluded. * * *" [Emphasis supplied.]

The language of the repealed statute of 1956, which, it should be pointed out, could easily have been employed in section 687(a), made it perfectly clear that a part of a year that was 6 months or more was to be counted as a whole year only for the purpose of computing readjustment pay.

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[1] The section was amended in 1966. However, for present purposes, that amendment is irrelevant.

Defendant has stressed that the Senate report accompanying H.R. 10433 (part of which became section 687(a), as passed states:

> This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress, and to transfer to title 10, provisions now in other parts of the code.

S.REP.NO.1876, 87th Cong., 2d Sess., 1962-2 U.S. CODE CONG. & AD. NEWS, p. 2456. We think the defendant relies too heavily upon this general statement of purpose, however, especially when the impact of the statement turns on a determination of what is a "substantive change in existing law." Even if the legislative history of section 687 (a) contained no indicia of an intent contrary to that expressed in the quoted statement of purpose, we doubt whether that statement, standing alone, furnishes the clear and compelling evidence of intent which is required before the plain meaning of statutory words can be disturbed.[2]

In any event, we are not faced with having to decide whether the statement of purpose, standing alone, is sufficient to justify disturbing the plain meaning of the statute because there is, in the statute's legislative history, a strong indication that the intent of Congress was in accord with the statute's plain meaning. In enacting section 687 (a), Congress discarded the unambiguous language of the 1956 statute and adopted, instead, language which it had

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[2] Defendant also points to the fact that the revision notes accompanying Senate Report No. 1876 state that the words " 'For the purposes of' are omitted as surplusage." S.REP. No. 1876, 1962-2 U.S. CODE CONG. & AD. NEWS, p. 2457. This is no argument at all. The omitted words would have been surplusage regardless of the interpretation given section 687(a).

ample reason to believe would make the rounding provision applicable to the eligibility requirement as well as to the computation formula.

The 1956 statute originated as H.R. 9952. As it was passed by the House, the bill read, in pertinent part:

> "SEC. 260. (a) A member of a reserve component who is involuntarily released from active duty after having completed immediately prior to such release at least 5 years of continuous active duty, except for breaks in service of not more than 30 days, as either an officer, warrant officer, or enlisted person, is entitled to a lump-sum readjustment payment computed on the basis of one-half of 1 month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the 18th year. *For the purposes of this subsection, a part of a year that is 6 months or more is counted as a whole year, and a part of a year that is less than 6 months is disregarded.* * * *" [Emphasis supplied.]

H.R. 9952, 84th Cong., 2d Sess. (1956). The Senate, however, amended the legislation, adopting several recommendations contained in a letter, dated November 17, 1955, from the Comptroller General to Senator Russell, Chairman of the Committee on Armed Services, commenting on a similar bill. That letter stated in pertinent part:

> Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying

service. If so, the language should be clarified, perhaps somewhat as follows:

> "For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded."

1956-2 U.S.CODE CONG. & AD. NEWS, pp. 3068, 3070. The restoration in section 687(a) of the language of H.R. 9952, that which the Comptroller viewed as reducing the minimum qualifying service to 4 years and 6 months, is, we think, a strong indication of congressional intent—far stronger than that on which the defendant relies. We do not mean to say that the legislative intent underlying section 687(a) is in accord with the clear meaning of the statutory words, only that the legislative history of that section does not so clearly evidence an intent inconsistent with the plain meaning of the statutory language as to enable us to depart from that plain meaning.

Defendant also argues that the Department of the Navy, one of the agencies charged with the administration of section 687(a), interprets the statute as providing for rounding only for the purpose of computing readjustment pay, and that this administrative interpretation of the statute is entitled to great weight.

There are many instances when the prior administrative interpretation of a statute is entitled to great respect.

> • • • [T]he practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. [Footnote omitted.]

McLaren v. Fleischer, 256 U.S. 477, 481, 41 S.Ct. 577, 578, 65 L.Ed. 1052 (1921). This is, however, but one of many principles bearing on the construction of legislation. It is not the cardinal or dominating rule. In this instance we find that, all things considered, the Navy's course of interpretation is less persuasive than the factors which point to the construction urged by the plaintiff. These other factors, the statutory words and the critical part of the legislative history to which reference has already been made, are sufficient to overcome the administrative construction.

For the foregoing reasons we grant plaintiff's motion for summary judgment and deny defendant's cross-motion for summary judgment. Judgment is entered for plaintiff in the amount of $13,554, computed, according to section 687(a), by multiplying his years of active service (9)[3] by 2 months' basic pay ($1,506). No interest is allowable under 28 U.S.C. § 2516 (1964).

NICHOLS, Judge (dissenting).

I think § 687 is ambiguous by reason of the words "* * * who has completed, immediately before his release, at least five years of continuous active duty * * *." This I read as saying that anything under five years is not enough. It is seemingly contradicted by subsection (2) as Judge Collins quotes it. If two parts of a statute can be read as not contradicting one another, that reading is to be preferred, but such a reading is difficult here. I agree that the legislative history looks both ways and the Navy practice is not of long enough standing to control, nor are we shown what the other Services have done.

Confronted with an ambiguous statute, with legislative history and prior administrative practice unhelpful, and with no prior court decisions cited to us, we must fall back on our intuition for the intent of Congress. It may be de-

[3] This figure is arrived at by totaling and rounding all of plaintiff's active duty service.

batable how finely tuned my intuition is, but for whatever it is worth, I just cannot force myself to believe the Congress intended that anyone having under five years active service should qualify. It might be said, if the Congress meant four years and six months when it wrote five years, it would have been simpler to have written four years and six months. I do not say it because, in all honesty, I know that the Congress sometimes elects the long way around. That approach is too simplistic. We may ask ourselves instead what legislative scheme or plan would envision four years and six months as a qualifying period. How was it selected?

In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process. I think that in 1962 they just simply overlooked that in adopting a change of language, there might be some literal-minded persons who would infer a change of meaning. The struggle between the brash re-codifer who wants to "clean up" the language, and is sure he knows how to do so without changing substance, as against the cautious one who clings to obsolete and opaque terminology, for fear of making an inadvertent change, is ancient in the field of legislative draftsmanship. Notorious examples exist in other fields, as for example the standard policy of marine insurance. Conceding that, if I am right, the recodification here was not skillfully done, I think the result gives aid and comfort to the anti-re-codification school of thought and tends to discourage an activity which, in my view, is in the public interest on the whole.

That the change was inadvertent is strongly supported by the reports reproduced in 1962-2 U.S.Code Cong. & Ad. News, at p. 2457. They set forth the statutory sources of § 687, purport to show each change of language, and to explain in each instance the lack of any substantive change. Yet the reduction of the qualifying period from five years to four years six months is nowhere mentioned. I believe that the Congress, had it consciously considered reducing

the qualifying period as alleged, would have held hearings and received reports and testimony. This would have been a matter of importance to the GAO, which commented on the 1956 legislation, as well as to executive agencies, and to veteran's organizations. Apparently nothing of the kind occurred.

I take this occasion to reiterate what I wrote, concurring, in Sarkes Tarzian, Inc. v. United States, 412 F.2d 1203, 1214, 188 Ct.Cl. 766, 787 (1969):

> Defendant forgets that the intent of Congress must be our lodestar, and that any statutory construction necessarily imputes an intent to Congress. If Congress didn't intend it, the statute doesn't do it. • • •

There it was defendant that forgot. Here I fear it is the court.

APPENDIX D

PENDING FEDERAL COURT CASES INVOLVING ENTITLEMENT TO READJUSTMENT PAY UNDER 10 U.S.C. § 687(a).

O'Meara v. United States—Court of Appeals for the Seventh Circuit, Docket No. 73-1802. Class action certified to the Court of Appeals by the District Court for N.D. Ill., Docket No. 72-C-2386.

Bushery v. *United States*—District Court for W.D. Miss., West. Div., Docket No. CA2056-2. Class action.

Sixt v. United States—District Court for S.D. Cal., Docket No. 73-102-E.

Court of Claims cases:	Docket No.
Brown v. United States	393-72
Clough v. United States	147-72
Crooks v. United States	143-73
Dalluge v. United States	136-73
Harris v. United States	327-72
Lafaver v. United States	184-72
Lattimore v. United States	366-72
Murphy v. United States	250-72
Parker v. United States	144-73
Reuter v. United States	241-72
Smythe v. United States	255-72
Wells v. United States	407-72

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5661

FRANCIS A. ADAMS, ET AL., PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioners in these cases have served more than four and a half years, but less than five years, of active military duty. They were denied readjustment pay when they were involuntarily separated from active service, on the ground that 10 U.S.C. 687(a) authorizes such payments only after five years of service. That Section provides that a member of a reserve component released after "at least five years of continuous active duty" is entitled to a readjustment payment of two months' basic pay for each year of service. It also states that

a partial year over six months is to be counted as a whole year, while a partial year less than six months is to be disregarded. They contend that the statute's rounding provision applies to the length of service requirement, so that, having served more than four years and six months, they must be considered to have served five years, and to be entitled to readjustment pay.

Petitioner in No. 73-604 was released after continuous active duty in the Army Reserve for four years, nine months, and thirteen days; the Army denied his request for readjustment pay of $10,638 (Pet. in No. 73-604 at 3). He commenced this action in the district court for the District of Montana; on June 20, 1972, he was awarded judgment of $10,000 (Pet. App. in No. 73-604 at 3a).[1]

Petitioners in No. 73-5661 were reserve officers in the Marine Corps, who were notified that they would be released from active duty after more than four and a half years but less than five years of continuous service, under orders which specified they were not entitled to readjustment pay. Prior to their release dates, petitioners brought separate actions in the district court for the Central District of California seeking to enjoin their involuntary release and to compel payment to them of readjustment pay.[2] Preliminary injunctions issued, which were dissolved when the petitioners completed five years of service (Pet. App. in No. 73-5661 at 14-

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[1] To bring the case within the district court's jurisdiction under 28 U.S.C. 1346(a), petitioner waived his claim to readjustment pay in excess of $10,000 (Pet. App. in No. 73-604 at 2a).

[2] It was stipulated that the readjustment pay, if due, would be $9,273 for petitioner Adams and for petitioner Steneman, and $10,065 for petitioner Youngquist.

15).[3] On September 25, 1972, the district court held petitioners were entitled to readjustment pay (Pet. App. in No. 73-5661 at 13-15).

On appeal, the Ninth Circuit reversed both district courts, holding that petitioners are not entitled to readjustment pay, since the rounding provision applies only for the purpose of computing the amount of readjustment pay, not for determining whether the minimum five-year period of service necessary for eligibility has been met (Pet. App. in No. 73-604 at 4a-8a; Pet. App. in No. 73-5661 at 16-19).[4]

As the court of appeals recognized (Pet. App. in No. 73-604 at 6a), its decision conflicts with that of the Court of Claims in *Schmid* v. *United States,* 436 F. 2d 987 (Ct. C.), certiorari denied, 404 U.S. 951. In *Schmid,* the Court of Claims held that a serviceman having active service of more than four and one-half, but less than five years, qualifies for readjustment pay (Pet. App. in No. 73-604 at 9a). As our petition for certiorari in *Schmid* stated (No. 71-361, O.T. 1971, pp. 5-6), under the four and one-half year eligibility requirement announced by the Court of Claims, the government would be subject to an estimated potential liability of more than $12,000,000. Moreover, the controversy over the minimum service requirement for readjustment pay has led to many cases now pending in numerous

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[3] Both courts below held that petitioners' service for more than five years because of the injunctions did not render them eligible for readjustment pay. No issue relating to these injunctions or their effect on petitioners' rights is raised in the petition.

[4] The decision of the court of appeals is also reported at 483 F. 2d 220.

lower courts (see Pet. App. in No. 73-604 at 20a).[5] For these reasons, this Court should resolve the conflict between the Ninth Circuit and the Court of Claims.

We submit that the decision of the Ninth Circuit is correct; the minimum service requirement for readjustment pay is a full five years. Section 687(a) expressly requires "at least five years of continuous active duty" for eligibility. The ambiguity that arises from the juxtaposition of this portion of Section 687(a) with the rounding provision is dispelled by the history of the readjustment pay provision. As originally enacted in 1956, the statute specified that "at least five years of continuous active duty" were necessary. 70 Stat. 517. Under that statute, as under the present one, the amount of the readjustment pay, as well as entitlement to it, was based upon the number of years of active duty. There was no ambiguity created by the original rounding provision, however, because the 1956 act provided, "*For the purposes of computing the amount of readjustment payment,* (1) a part of a year that is six months or more is counted as a whole year * * *." 70 Stat. 517 (emphasis added). Indeed, the underscored phrase was added at the suggestion of the Comptroller General in order to preclude any possible confusion as to whether a full five years' service was required for eligibility. See S. Rep. No. 2288, 84th Cong., 2d Sess. 11.

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[5] In addition to the fifteen cases cited by petitioner Cass, at least seven other pending cases involve this issue. *Bell* v. *Secretary of the Navy*, Civ. No. 72-1944 (C.D. Cal.); *Branson* v. *United States*, Civ. No. 73-H-1135 (S.D. Tex.); *Fimiani* v. *Secretary of the Navy*, No. 73-2822 (C.A. 9); *Hudson* v. *Secretary of the Navy*, Civ. No. 72-2860-FW (C.D. Cal.); *Krane* v. *Secretary of the Navy*, Civ. No. 72-2859-FW (C.D. Cwal.); *Owens* v. *Secretary of the Navy*, Civ. No. 73-420-FW (C.D. Cal.); *Reeid* v. *Secretary of the Navy*, Civ. No. 72-1789-FW (C.D. Cal.).

The present language of the rounding provision resulted from a 1962 codification of military statutes. 76 Stat. 506, 507. It is a settled principle of statutory construction that a change in statutory language resulting simply from a codification does not alter the meaning of the statute, even where a literal construction of the new language could result in a substantive change. See, *e.g.*, *United States* v. *Cook*, 384 U.S. 257; *Ohio Bank & Savings Co.* v. *Tri-County National Bank*, 411 F. 2d 801 (C.A. 6). That principle is especially applicable here, inasmuch as both committee reports accompanying the 1962 codification specify that the bill was "not intended to make any substantive change in existing law." S. Rep. No. 1876, 87th Cong., 2d Sess. 6; H. Rep. No. 1401, 87th Cong., 2d Sess. 1.

Moreover, the rounding provision serves a functional purpose only with respect to computing the amount of pay. If Congress had intended that four and one-half years of service were sufficient for eligibility, it could simply have so specified rather than adopting a circuitous method for determining eligibility. Finally, under the uniform administrative construction of the present provision, a serviceman is ineligible for readjustment pay unless he has five full years of service. This administrative construction is entitled to deference. *Udall* v. *Tallman*, 380 U.S. 1.

For these reasons, we believe that the decision below is correct. We nevertheless acquiesce in the granting of these petitions for certiorari, so that the conflict with the Court of Claims may be resolved.

It is therefore respectfully submitted that the petitions for writs of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.